No. 3192

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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The United Properties Company of California, et al.,
Plaintiffs in Error,

vs.

Mary Ellen Kibbe,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Keyes & Erskine,
Attorneys for Defendant in Error.

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The statement of the case by plaintiffs in error is very meager. It consists of a synopsis of the pleadings. As far as it goes, it is not controverted. We will, however, in discussing the questions raised when we come to them, state the facts of the case more fully than they appear in the brief of plaintiffs in error.

THERE IS NO DOUBT THAT THE COMPLAINT STATES A CAUSE OF ACTION.

The action is based upon an instrument, the most material portion of which reads as follows:

"The United Properties Company of California, a corporation organized and existing under the laws of the State of Delaware, for value received, promises to deliver to Ira M. Condit and Mary Ellen Kibby as Joint Owners, or the Survivor of them, or order, upon the surrender of this certificate duly endorsed, thirteen of its 'First Mortgage and Collateral Trust Five Per Cent Fifty Year Sinking Fund Gold Bonds', of the denomination of One Thousand Dollars ($1000.00) each, with all interest coupons thereto attached, said bonds to be issued under and secured by the Deed of Trust in preparation dated January 1, 1911, made by said The United Properties Company of California, and to be delivered hereunder as and when the said bonds may be certified and ready for delivery."

The argument that plaintiffs in error make to support their assertion that the complaint does not state a cause of action may be divided into two phases. They first point out that no time for the delivery of the bonds is specified; they then state that the proper construction of the agreement is that the bonds were not to be delivered until prepared for delivery; they then, in effect, assert that the preparation of the bonds for delivery was a condition precedent to their liability; that they had an indefinite, perhaps interminable, time within which to prepare the bonds for delivery and that therefore the failure of the defendant in error to allege in her complaint that the bonds were ready for delivery was fatal to her cause of action. Realizing how erroneous this line of reasoning is, they

abandon it in the second phase of their argument by practically conceding that the company only had a reasonable time within which to complete the deed of trust and to prepare the bonds for delivery, and that after the expiration of this time the bonds became deliverable on demand and surrender of the certificate, and that a failure to so deliver them would amount to a breach of contract, whether or not the bonds had been prepared for delivery. To escape the force of this argument, whose truth they in effect concede, they then assert that the complaint fails to allege facts from which the court can conclude that a reasonable time for the company to prepare the bonds for delivery has elapsed.

These are the two phases of their argument on this point and it is apparent that the argument contains its own refutation. During their statement of it they make several erroneous assertions which we will briefly notice. For instance, they state that defendant in error should have alleged "that from and after a certain date an unreasonable time had elapsed and that the defendant had failed within that reasonable time to perform its obligation" (brief of plaintiffs in error, page 16). What is a reasonable or unreasonable time to perform an act is a legal conclusion to be drawn from the nature of the contract and the particular circumstances of the case. See *13 C. J. on Contracts,* Section 782, and *Greenberg v. California B. R. Co.,* 107 Cal. 667, 671, quoting *Parsons on Contracts* to the following effect:

> "If the contract specifies no time the law implies that it shall be performed within a reasonable time, and will not permit this implication to be rebutted by extrinsic testimony going to fix a definite term, because this varies the contract. What is a reasonable time is a question of law. And, if the contract specify a place in which articles shall be delivered, but not a time, this means that they are deliverable on demand."

It is not good pleading to allege legal conclusions (*12 Am. & Eng. Ency. of Practice,* 1020). Again, they assert that as the indorsements on the instrument show payment of interest up to January 1, 1913, that they "could not have been in default on January 1, 1913" (brief of plaintiffs in error, page 14). Their obligation under the certificate was to deliver bonds and not pay interest; indeed, the payment of interest on the certificate is not mentioned in it and we fail to see what bearing the payment of interest may have upon the obligation of the company under the certificate to deliver the bonds. Again, they assert that as the complaint alleges that the deed of trust was not executed "that the failure to deliver the bonds was legal" (brief of plaintiffs in error, page 17). To answer this we need only quote from another portion of their involved argument. On page 14 of their brief they state:

> "It may be conceded, of course, that the corporation could not refuse to execute the deed of trust and could not indefinitely postpone a delivery of the bonds."

The complaint is based upon the certificate we have quoted. When reduced to its simplest terms, this certificate says: The United Properties Company promises to deliver to Ira M. Condit and Mary Ellen Kibbe as joint owners thirteen one thousand dollar bonds upon surrender of this certificate. This is practically a promise to deliver at any time the certificate is surrendered, which is the same thing as a promise to deliver upon demand. Plaintiffs in error say that this is not the exact construction of the instrument, and they contend that the obligation of the company to deliver the bonds was not to be performed upon demand, but only when the company had completed its deed of trust and prepared its bonds for delivery. Even so, the company did not have an indefinite time within which to perform these acts, but only a reasonable time; and after this reasonable time had elapsed her failure to deliver the bonds upon demand and surrender of the certificate would be a breach of contract.

Section 1657 of the Civil Code provides:

> "If no time is specified for the performance of an act required to be performed, a reasonable time is allowed."

This is a statement of an elementary rule of law. (See also *Greenberg v. California B. R. Co.*, quoted from, supra.) The plaintiffs in error practically concede its application to this case; but, as we have stated, they contend that the complaint does not

allege facts from which the court can conclude that a reasonable time for the company to prepare the bonds for delivery had elapsed before demand was made.

The complaint states that the date of the promise to deliver the bonds was February 15, 1912, and that the demand was made in September, 1915, three years and nine months after the promise was made. The action was not commenced until December, 1915, almost three months after the demand was made and almost four years after the promise. The time that has elapsed is therefore shown in detail. Furthermore, the instrument sued on says that the deed of trust given to secure the bonds was in preparation on January 1, 1911. So it appears from the complaint that the company was preparing five years before the commencement of the action to issue these bonds. Upon this last fact alone the court could predicate its conclusion that a reasonable time had elapsed. The complaint goes further—it states that the bonds were never executed, and that upon the demand made three years and nine months from the date of the instrument that their delivery was absolutely and unconditionally refused.

In *13 C. J. on Contracts,* Section 782, the text-writer says:

> "The question as to what is a reasonable time for the performance of a contract fixing no time for performance depends on the nature of the contract and the particular circum-

stances. * * * Perhaps as accurate a definition of reasonable time as may be given is that it is such time as is necessary conveniently to do what the contract requires should be done."

The nature of the acts to be performed by the company in this case was the completion of the deed of trust, which the agreement recites was dated January 1, 1911, and was in the course of preparation, and the preparation and delivery of the bonds. What is the time necessary to conveniently perform these acts? This court knows how long it takes to comply with the provisions of the law concerning the execution, acknowledgment, recording, issuance and delivery of the bonds and deed of trust. Six months is the maximum length of time it should require. As the complaint shows that three years and nine months had elapsed before demand was made for the bonds and that at the time the demand was made that the deed of trust had not been prepared nor the bonds executed, it is absurd for the plaintiffs in error to contend that the complaint does not show the expiration of an unreasonable length of time for the performance of these acts.

All that is necessary for the complaint to show and all that it can show without pleading conclusions of law is the nature of the acts to be performed and the time which has elapsed; from these elements the law concludes whether a reasonable time has expired. The complaint in this case shows both these elements and it is therefore above the criticism urged against it. For cases in which the court

has concluded that a reasonable time has elapsed when there has appeared in the complaint only a statement of the time that has expired, see *Hannan v. McNickle,* 82 Cal. 122; *Fowler v. Sutherland,* 68 Cal. 416, and *Nance v. Pena,* 41 Cal. 686.

We have assumed that the construction that plaintiffs in error placed upon the instrument is correct, and that the company had a reasonable time after the date of the instrument within which to complete the deed of trust and prepare the bonds for delivery. An analysis of the certificate will show that this is not its proper construction. The certificate shows, first, a promise to give the bonds upon surrender of the certificate; second, the bonds are to be secured by a deed of trust in preparation made by The United Properties Company and "to be delivered hereunder as and when the bonds may be certified, and ready for delivery". The words "as and when, etc.", refer obviously to the delivery of the deed of trust—that is the plain and grammatical construction of the sentence. It appears, therefore, that the bonds were to be delivered upon the surrender of the certificate, that is, upon demand, and that the company did not have a reasonable time after the date of the certificate to prepare the bonds for delivery. As we have shown. however, that much more than a reasonable time to perform this act had elapsed, when the demand was made, this question of construction becomes immaterial.

The gravamen of the complaint is that the company agreed to deliver the bonds upon demand or

within a reasonable time after the date of the certificate (it makes no difference which construction is adopted); that after the expiration of a totally unreasonable length of time that the certificate was surrendered to it and demand made for the bonds; and that this demand was unconditionally refused. There can be no question that a cause of action was stated.

In support of their assignment of error, that the complaint does not state a cause of action, the plaintiffs in error make the point that the contract alleged is so uncertain that it cannot be made the basis of an action. We do not think that plaintiffs in error are serious in advancing this argument, for in the appendix to their brief they assert that although the contract is not sufficiently specific to be specifically enforced, yet it is sufficiently certain to create an equitable lien and that therefore a recovery cannot be had without foreclosing the lien. The plaintiffs in error are unable to sustain their contention that the certificate created an equitable lien; but what they say in the course of their argument on this point is a sufficient answer to their contention that the contract expressed in the certificate is so uncertain that it cannot be enforced.

There is nothing uncertain or ambiguous in the contract upon which suit is brought. It is an agreement to deliver thirteen first mortgage bonds whose denomination, rate of interest and date of

maturity are specified. The company has breached this contract by failing to deliver the bonds and defendant in error is seeking *not specific performance of the contract,* but damages for its breach. As the law presumes, in the absence of evidence to the contrary, that the damages suffered by a refusal to deliver bonds under a contract of this kind is the par value of the bonds, there is obviously no such uncertainty in this contract as to accomplish its destruction. Contracts of an identical nature have been enforced by the courts. In *Henry v. North American Railroad Construction Co.,* 158 Fed. 79, an action was brought on a contract of employment which provided for payment in cash and by "20 of the first mortgage 5% gold bonds of the Shawton Company, each for the principal sum of $1000.00". Damages for failure to deliver the bonds were allowed by the Circuit Court of the Eighth Circuit in the Henry case without question.

The plaintiffs in error did not raise this point of uncertainty in the contract in the trial court and have not assigned the point as error; hence the only assignment of error under which they can make the point is their assignment that the complaint does not state facts sufficient to constitute a cause of action. It is quite clear that the terms of this contract set out in the complaint are sufficiently certain to make the complaint impervious to general demurrer. If the plaintiffs in error were uncertain as to what the contract sued on meant their remedy was by motion to make more certain and not by

suggesting the point for the first time in these proceedings on writ of error.

Furthermore, the rules enunciated by the author of Contracts in *6 R. C. L.* page 645, entirely destroy any argument which the plaintiffs might have made either on demurrer or at the trial. These rules are:

> "However, the law does not favor, but leans against the destruction of contracts because of uncertainty. Therefore, the courts will, if possible, so construe the contracts as to carry into effect the reasonable intention of the parties if that can be ascertained. Though there are some formal imperfections in a written contract, still it is sufficient if it contains matter which will enable the court to ascertain the terms and conditions on which the parties intended to bind themselves. The maxim *Id certum est, quod certum reddi potest,* applies. * * * Also, an ambiguity or uncertainty may be removed by the acts, conduct, declarations, or agreements of the parties. In other words, an uncertain agreement may be so supplemented by subsequent acts, agreements, or declarations of the parties as to make it certain and enforceable. The acts of practical construction placed upon a contract by the parties thereto are binding, and may be resorted to to relieve it from doubt and uncertainty. This is simply an extension of the maxim referred to."

See also *McIntyre Lumber etc. Co. v. Jackson Lumber Co.,* 51 So. (Ala.) 767; *Witty v. Michigan Mutual Life Ins. Co.,* 24 N. E. (Ind.) 141; *Northern Central Ry. Co. v. Walworth,* 44 Atl. (Pa.) 253, and *Daily v. Minnick,* 91 N. W. (Ia.) 913.

The uncertainties of which the plaintiffs in error principally complain are those respecting the terms of the deed of trust. We do not understand how the terms of the deed of trust can effect our right to recover damages for the company's failure to deliver bonds. Yet let us assume these terms are material. The certificate recites that the deed of trust is in preparation and is dated January 1, 1911. The certificate upon which suit is brought is dated February 15, 1912. If an uncertainty did exist as to the terms of the deed of trust, and it was essential to the cause of action to establish these terms, here was an uncertainty which could be made certain by proof. Furthermore, resort could be had to the agreements between Hanford and the company, their acts, declaration and conduct respecting these certificates and the practical construction placed by them upon the certificates to dispell any uncertainty which the plaintiffs in error claim exists in the instrument.

The conclusion is that the point, that the contract alleged is so uncertain that it cannot form a basis for an action for damages is not well taken. The cases cited by plaintiffs in error in support of this proposition are not in point and do not militate against this conclusion.

FACTS OF CASE RELATIVE TO EXECUTION OF CERTIFICATE REVIEWED.

The next points raised by the plaintiffs in error are that the execution of the certificate was unauthorized in the first instance and was, therefore, not the contract of the company and that there was never a subsequent ratification of the execution of this certificate which would render it enforceable. A proper consideration of these questions requires a knowledge of the facts of the case.

The United Properties Company was organized under the laws of Delaware (Trans. p. 109). It was formed and intended to be a holding company. It purposed to acquire the capital stock of other corporations (Trans. pp. 63 and 112). R. G. Hanford, W. S. Tevis and Frank M. Smith were its founders. They intended to transfer to it certain shares of stock of other corporations which they held. After the formation of the company and in pursuance of this plan, at a meeting of the directors of the company, Mr. R. G. Hanford made in writing to the directors two proposals. The first is referred to in all the proceedings of the company as Offer No. 1—the second is referred to as Offer No. 2.

In the first Offer Mr. Hanford agreed to deliver to the defendant, The United Properties Company, certain shares of the capital stock of the corporations named therein. In exchange for all of said shares of stock and as a consideration for the delivery thereof to The United Properties Company,

Hanford requested the delivery to him of the securities of The United Properties Company (Trans. pp. 64-71). This offer contained the following provision (Trans. pp. 70-71):

> "If this offer is accepted by you, the exchange of stock herein contemplated shall be made and consummated within 30 days from date of such acceptance.
>
> If your company is unable within said time to issue and deliver to me the permanent First Mortgage Bonds or Convertible Debenture Bonds of your company herein above mentioned, I agree to accept from you in lieu thereof certificates for such bonds authorized and issued by you, which certificates shall provide that the holders thereof shall be entitled to receive from you the said First Mortgage Bonds and Convertible Debenture Bonds as soon as same are executed, issued and ready for delivery, together with all interest coupons attached to said First Mortgage Bonds entitling the holder thereof to interest at the rate of 5% per annum from and after the first day of January, 1911.
>
> Yours truly,
>
> (Signed) R. G. Hanford."

In Offer No. 2 Mr. Hanford agreed to deliver to The United Properties Company certain shares of the common stock and certain shares of the preferred stock of the San Francisco, Oakland and San Jose Consolidated Railway, hereinafter referred to as the "Key Route", and of the Oakland Traction Company. In exchange for such shares of common and preferred stock, and as the consideration for the delivery thereof to The United

Properties Company, Hanford requested the delivery to him of certain securities of The United Properties Company. By the terms of Offer No. 2 Hanford did not ask for any first mortgage bonds nor for any certificates in lieu of bonds (Trans. pp. 71-80).

The court's attention is respectfully called to the fact that in Offer No. 2 the said Hanford did not require any first mortgage bonds as he did in Offer No. 1. As no first mortgage bonds were required by Hanford in Offer No. 2, of course nothing was said by Hanford in Offer No. 2 about accepting certificates in place of bonds.

At the meeting of February 24, 1911, at which the offers were made, Offer No. 1 was accepted by the following resolution (Trans. p. 65):

> "Be It Resolved: That the stocks offered by Mr. R. G. Hanford in his communication, a copy whereof is hereafter spread upon these minutes, are of the value of not less than $145,-346,730.00."
>
> Further resolved: "That the said offer be and the same is hereby accepted and that the proper officers of this company be and they are hereby authorized and directed to issue such shares of stock, bonds and convertible debenture bonds of this company and to do all such other acts and things as may be necessary to affect the said exchange."
>
> Further resolved: "That a copy of said communication of said R. G. Hanford be spread upon the minutes of this meeting."

Offer No. 2 was accepted by another, distinct resolution in practically the same language (Trans. p. 72).

Within thirty days thereafter Mr. Hanford delivered to The United Properties Company the shares of stock of the companies which he proposed to deliver in Offer No. 1 and received from The United Properties Company the securities which he required by Offer No. 1; included in these securities were certificates for 10,411 First Mortgage Bonds of $1000.00 each (Trans. pp. 98-99).

No first mortgage bonds were ever issued by The United Properties Company; there was issued, however, to Hanford 10,411 certificates for bonds (Trans. p. 99). This was the total amount of certificates issued. Thereafter these certificates issued to Hanford were transferred by him to different persons. These persons surrendered these certificates to The United Properties Company and received others made out to them instead of to R. G. Hanford, the original payee. Thereafter when the certificates thus issued was transferred by the payee therein named it was surrendered by the transferee to The United Properties Company and a new certificate issued in the name of the transferee. The certificate sued upon in this case thus found its way into the hands of the defendant in error (Trans. pp. 113-118).

From the time that the said certificates for 10,411 bonds were issued to R. G. Hanford during the

years 1911, 1912 and 1913 there was kept in the office of the company a certificate book containing documents numbered from 1 to 1500, inclusive, of the same form, tenor and containing the same provisions, terms and covenants contained in the certificates sued on, except that the name of the holder, the amount thereof and the date thereof were left blank and there were no signatures thereon and the seal of the corporation was not affixed thereto. Attached to each of these certificates was a stub. When a certificate was issued, the name of the holder, the number of the certificate, the amount thereof and the date of issuance was written on the stub and then the certificate was detached from the stub and given to the holder after having been signed by the officers of the corporation and after having the seal affixed. When a certificate so issued was surrendered it was again affixed to its proper stub, and the officers receiving the same noted on the stub that the certificate had been returned and the number of the certificate or certificates which were issued in lieu thereof. Certificates from number 1 to 1500 for various numbers of bonds and in various amounts were issued, surrendered and reissued (Trans. p. 119).

These transactions took place during the years 1911, 1912 and 1913. All of the directors knew that these transactions were taking place; all of the directors had at various times received certain of

during the last mentioned period held a majority in number of the shares of the capital stock issued by the said corporation (Trans. pp. 119-120).

No resolution was ever at any time adopted disaffirming or disapproving of these transactions and no measures were ever taken by the company or by its board of directors to prevent these transactions (Trans. p. 100).

Interest was paid on the indebtedness evidenced by the certificates issued to Hanford or by those reissued in the place of those issued to Hanford, including the one herein sued upon. This interest was paid in semi-annual installments at the rate of five per cent per annum for the following periods:

From January 1, 1911 to July 1, 1911,
From July 1, 1911, to January 1, 1912,
From January 1, 1912, to July 1, 1912, and
From July 1, 1912, to January 1, 1913.

Part of the first installment of interest was paid on July 1, 1911, the balance thereof on November 18, 1911, the second installment on the 2nd of January, 1912, the third installment on the 6th of July, 1912, and the fourth installment on January 9, 1913 (Trans. pp. 118-119).

This interest was paid by The United Properties Company. All of the directors knew of the payment of this interest. No resolution was ever adopted by the board of directors disaffirming or diapproving of the payment of the said interest. No measure was ever taken by the directors or by

the company to prevent the payment of this interest (Trans. p. 100).

On the 5th of December, 1911, almost a year after these certificates had been issued to R. G. Hanford, and after one installment of interest had been paid, a meeting of the stockholders of The United Properties Company took place. At this meeting 625,378,202 shares of the stock of the corporation were present either in person or by proxy. At that time the total amount of the stock of the corporation issued was 707,380,942 shares; 502,000 shares of stock were present at the said meeting by W. S. Tevis. The stockholders present at that meeting knew of the payment of interest, and of the issuance of the certificates to Hanford. Upon motion duly made and seconded and unanimously carried, the stockholders on the last mentioned date adopted the following resolution (Trans. pp. 101- 109):

> "Resolved: That all the acts, contracts and proceedings of the officers, directors and committees of this corporation since the first meeting of the incorporators of this corporation, which meeting was held in the City of Wilmington, State of Delaware, on the 31st day of December, 1910, to this date, be and they are hereby in all respects ratified, confirmed and approved and declared to be the acts and deeds of this corporation" (Trans. p. 108).

These are the facts upon which a determination of the points raised by the plaintiffs in error in their brief must be determined.

THERE CAN BE NO QUESTION THAT THE ISSUANCE OF THE CERTIFICATE SUED ON WAS AUTHORIZED BY THE COMPANY IN THE FIRST INSTANCE; THAT IT WAS ITS CONTRACT AND ENFORCEABLE AS SUCH.

The reasons upon which the plaintiffs in error base their claim that the contract sued on was never made by the company are extremely technical and abstruse; and in the light of the facts, as they have been recited, this claim appears entirely groundless. The reasons advanced are, first, that by his Offer No. 1 Hanford had offered to accept certificates only after the corporation had set in motion the machinery for the creation of a bonded indebtedness, and that as no step had been taken to create a bonded indebtedness that the certificates issued were not those referred to in Hanford's offer; and that by the resolution accepting the Hanford Offer No. 1 the corporation was authorized to issue certificates for bonds only after the creation of a bonded indebtedness, and as no bonded indebtedness had been created the issuance of the certificates was therefore unauthorized.

There is not a circumstance in the case that justifies the plaintiffs in error in making either of these assertions. We have already quoted the Hanford Offer No. 1. There is not a word in it respecting the creation of a bonded indebtedness. The plaintiffs in error would lead the court to believe that the terms of this offer made its acceptance conditional upon the creation by the corporation of a bonded indebtedness. They quote that portion of

the offer in which Hanford agrees to accept in lieu of the bonds "certificates for such bonds authorized and issued by you" (brief of plaintiffs in error, page 22). The word "authorized" which is italicized by them, they apparently construe as applying to the bonds. This is a palpably erroneous construction. What Hanford was offering to accept in lieu of the bonds were certificates to be authorized by the corporation. By the language of his offer he was asking that the certificates, and not the bonds, be authorized. This offer was accepted by the resolution we have quoted, which does not refer to the creation of a bonded indebtedness, but which in effect authorizes the corporation to issue the certificates. Thereafter this contract was consummated by Hanford delivering to the company the securities which he had offered to deliver to it and by the company delivering to Hanford its securities, including the certificates for bonds, which Hanford had agreed to accept in the exchange. If there is any doubt whether the certificates which Hanford had offered to accept were those which he received, it should be dispelled by the practical construction which was thus placed upon the agreement by the parties to it. In *Kennedy v. Lee*, 147 Cal. 603, the court said:

> "The construction which the parties give to a contract prevails where the language used will reasonably allow such construction."

If there is any question as to the true construction this rule is particularly applicable to this case.

The Hanford Offer No. 1 and the resolution accepting it must be read together. We have seen that the offer called for certificates in lieu of bonds and that its acceptance was in no wise made conditional upon the creation of a bonded indebtedness. Hence the resolution accepting this offer and, in effect, authorizing the issuance of the certificates, authorized the issuance of the certificates without regard to whether steps had been taken to create a bonded indebtedness.

The plaintiffs in error say that the company could not promise to create a bonded indebtedness until it had taken steps to create it. We cannot see why one cannot promise to give a bond before steps have been taken to create it, as well as after such steps have been taken. There is no difference between such a promise before and such a promise after creation of a bond issue is commenced. Until the creation is completed there is no bonded indebtedness created and there is therefore no more force in one promise than in the other. We submit that there is nothing in Offer No. 1 or the resolution accepting it that limits the certificates to the promise of a bond to be issued under bonded indebtedness in the process of creation.

The company was formed as a holding company. It had no assets until it received those Hanford offered. It could not get those except by exchange for its stock and bonds or certificates. If it was intended that the bonded indebtedness should be

in the process of creation before the company issued the certificates the company would have been required to take steps to create a bonded indebtedness without any property at all with which to create it. We submit that defendant's contention has not been sustained and that the issuance of these certificates was authorized by the resolution accepting Offer No. 1.

The conclusion is that the company through its board of directors authorized the issuance of the certificate upon which suit is brought, that it was its contract, and that it must be liable for its breach.

WHEN ALL THE ERRONEOUS ASSUMPTIONS OF PLAINTIFFS IN ERROR ARE ACCEPTED AS CORRECT HIS ARGUMENT MUST FAIL AS CORPORATION RATIFIED AND IS ESTOPPED TO DENY EXECUTION OF CERTIFICATE.

Apparently unsatisfied with their preceding argument, plaintiffs in error introduce this phase of their case by advancing another reason why the resolution accepting the Hanford Offer No. 1 did not authorize the directors to issue the certificates. They say that Hanford's Offers No. 1 and 2 were made by him as a general plan between himself and F. M. Smith for the creation of the corporation; that Smith failed to deliver all the securities which he had agreed to deliver to the corporation; and that the corporation's acceptance of the Hanford Offer No. 1 was a conditional acceptance,

which was to become absolute only when Smith complied with his agreement, and that therefore the resolution accepting the Hanford Offer No. 1 cannot be construed as an authorization by the directors to issue the certificates.

We must characterize this argument of plaintiffs in error as equally erroneous as the other arguments made by them to the same point. Mr. Hanford made two offers. There is nothing in the evidence to show that these offers were made as a part of a general scheme. Neither offer refers to the other and as far as the evidence goes, they are complete, separate and distinct (see minutes of directors' meeting of February 24, 1911, Trans. pp. 64-80, for both offers and both resolutions of acceptance). At the bottom of page 27 of their brief and at the top of page 28 the plaintiffs in error quote part of Hanford's Offer No. 1 and therein assert that the stock referred to was never delivered to the company. This is absolutely incorrect. In Offer No. 1 Hanford agreed to deliver certain shares of stocks in ten companies. He was to receive, among other things, for these shares of stock 10,411 certificates. He delivered the shares of stock to the company; it accepted these shares of stock and has held them ever since, and it delivered to him the 10,411 certificates from which the one herein sued upon came. According to the evidence, Offer No. 1 was completely complied with by both parties. The acceptance and retention by

the company of the benefits of the transaction was proved by evidence absolutely uncontradicted (Trans. pp. 98-99).

It is obvious that any agreement between Smith and Hanford before the creation of the corporation and to which the corporation was not a party could have absolutely no effect upon the contract entered into between the corporation and Hanford, which is evidenced by Offer No. 1 and the resolution accepting it.

Although it is quite immaterial in this case, the evidence shows that Hanford made Offer No. 2 on behalf of Smith, and that Smith delivered, not all, but most of the securities which he had agreed to deliver under the terms of Offer No. 2 (Trans. pp. 140 and 142). The corporation retained all these securities and never repudiated the contract consummated by its acceptance of Offer No. 2. It appears, therefore, that it is bound by this contract as well as by the contract consummated by its acceptance of Offer No. 1. Under no conceivable theory, therefore, can it make Smith's failure to completely comply with Offer No. 2 an excuse for its failure to comply with the contract created by its acceptance of Offer No. 1.

It follows that the last argument which plaintiffs in error make to show that the resolution accepting Offer No. 1 did not authorize the issuance of the certificates must utterly fail and that this express, formal authorization must be conceded.

Proceeding upon the assumption that they have established their point that the execution of the certificate sued on was never authorized in the first instance, an argument which we have shown to be utterly groundless, plaintiffs in error then attempted to show that the execution of the contract was never ratified by the company. That there was a ratification and that the company is estopped to deny that there was a ratification cannot be doubted.

We have already recited the facts surrounding this transaction. From these it is apparent that the issuance of the certificates for bonds was ratified by the following unequivocal acts, any one of which was a sufficient ratification in itself.

First, with knowledge of all the facts, the company retained all the securities given it in exchange for the securities, including the certificates for bonds, which it had delivered to Hanford, and it has made no effort to rescind the transaction or restore the consideration.

> "Retention of the consideration of a transaction and acceptance of its benefits is a ratification."
>
> *Curtin v. Salmon River Co.,* 141 Cal. 308;
>
> *Phillips v. Sanger,* 130 Cal. 431;
>
> *Dickenson v. Zubiat Mining Co.,* 11 Cal. App. 664;
>
> *Illinois Trust and Savings Bank v. Pacific Railroad Co.,* 117 Cal. 332.

Second, the officers of the company openly in the office of the company, with the knowledge of the directors and stockholders publicly and continuously for a period of three years and more issued, accepted the surrender of and reissued these certificates in the same manner as they would stock certificates or registered bonds. The allowance of an open public and continuous exercise of authority is a ratification of it.

> *2 Thompson on Corporations,* Section 1427;
> *10 Cyc.* pages 937 and 1081.

Third, the directors and stockholders knew that the certificates had been issued to Hanford, that they were being transferred to others, surrendered and reissued, that there were books kept for that purpose in the office of the company which constituted part of the office records. This course of conduct on the part of the officers continued for three years, and yet neither the directors or stockholders, during that period or at all, ever disaffirmed or disapproved or took any measures necessary to prevent these transactions. The stockholders and directors acquiesced in the acts of their officers. Such acquiescence and failure to disaffirm within a reasonable time constitutes a ratification.

> *Brown v. Crown Gold Mining Company,* 89 Pac. 86 (Cal.);
> *Illinois Trust and Savings Bank v. Pacific Railroad Co.,* 117 Cal. 332;

Curtin v. Salmon River Co., 141 Cal. 308;
Riley v. Loma Vista Ranch Co., 1 Cal. App. 491;
Clark and Marshall on Private Corporations, Vol. 3, page 2188.

The last mentioned authority states the rule as follows:

> "Ratification may also be implied, or the corporation be held estopped to deny ratification, from acquiescence on the part of the corporation. When the officers or agents of a corporation exceed their powers in entering into contracts or doing other acts, the corporation, when it has knowledge thereof, must promptly disaffirm the contract or act, and not allow the other party or third persons to act in the belief that it was authorized or has been ratified. If it acquiesces, with knowledge of the facts, or fails to disaffirm, a ratification will be implied, or else it will be estopped to deny a ratification."

Fourth. The company paid the interest on the indebtedness evidenced by these certificates for three years. The directors and stockholders at all times knew that this interest was being paid, they knew also that if a certificate was surrendered and a new one issued that interest was paid to the holder of the new one. The payment of interest alone should constitute ratification of the issuance of these certificates.

Fifth. The stockholders, with knowledge of all these facts and all the business of the corporation, adopted a resolution approving and ratifying

all the acts of the officers and directors. There can be no question that this resolution alone was sufficient to ratify all the acts of the directors and officers of the corporation, including the issuance of the certificate sued on. It is needless to cite authorities holding that such a resolution is a sufficient ratification in itself, but we respectfully call the court's attention to the case of *Riley v. Loma Vista Ranch Co.*, 1 Cal. App. 491, in which a similar resolution was adopted.

The plaintiffs in error seek to avoid the effect of this ratification and estoppel, which is so overwhelmingly established, by asserting that the certificate was a contract to create a mortgage and that, therefore, it should be executed with the same formalities as a mortgage. They cite no authority to support this claim; nor do they seek to support it by any reasoning; but they content themselves with the bare assertion of it. Their assumption is erroneous.

In the first place the certificate sued on was not a mortgage but an unsecured promise; it creates no lien upon anything. It does not purport by its terms to hypothecate or pledge anything as security for its performance. It is just like any number of unsecured agreements. The distinction between an unsecured promise and a mortgage is very obvious. A mortgage creates a lien which can be enforced against the property of the company in favor of the holder thereof in preference to the claims of gen-

eral creditors and of stockholders, while the holder of an unsecured promise can only collect from the corporation his pro rata with the other general creditors in case the assets of the corporation are not sufficient to pay all in full.

We are unable to conceive, therefore, why the certificate should be executed with the same formalities as a mortgage.

Assuming, however, that such formalities should have been observed in its execution, the plaintiffs in error do not state the formalities which the execution of a mortgage requires and which they claim should have been observed in the execution of the certificate. As we have shown, the issuance of the original certificates to Hanford was authorized by the resolution of the board of directors accepting the Hanford offer No. 1; and the certificate sued on is signed by the vice-president and assistant treasurer of the company and has the corporate seal attached. Even though the certificate should have been executed with the same formalities as a mortgage, no additional acts could have been required to lend it validity.

This part of the argument of plaintiffs in error is apparently based upon the assumption that the execution of the certificates were not authorized by the resolution of the board of directors. Their technical and abstruse arguments totally failed to establish a lack of authorization. Despite this, however, they proceed on the assumption that the

board of directors never authorized the issuance of the certificates, and after making the additional assumption, which is also baseless, that the certificates should have been executed with the same formalities as a mortgage, they cite some California cases to the effect that the execution of a mortgage by a corporation should be authorized by the formal act of the directors. This is doubtless the law respecting mortgages; and a mortgage not so authorized cannot be enforced against the corporation unless the corporation has ratified it or is estopped to deny it. In California, because of a peculiar provision of our code, a distinction is drawn between a ratification of an act by a corporation and its estoppel to deny the act (*Blood v. Serena Land & Water Co.,* 113 Cal. 221). It is a distinction without a difference, and is peculiar to the law of California and would not be recognized by the federal courts, who would follow the rule respecting ratification by a corporation which has been practically universally established. However, there can be no question in this case that the corporation both ratified the execution of the certificates and that it is estopped to deny their execution. Therefore, even assuming that the groundless assumptions of the plaintiffs in error are correct, that is, that the issuance of the certificates was never authorized by a formal act of the board of directors, and that the certificates should have been executed with the same formalities as a mortgage, and that these formalities were not observed, even so their argument must

fail, as the corporation both ratified the execution of these certificates and is estopped to deny their execution.

THE AMOUNT OF DAMAGES SUFFERED BY DEFENDANT IN ERROR BY REASON OF BREACH OF CONTRACT TO DELIVER BONDS SUFFICIENTLY ESTABLISHED.

The next point which plaintiffs in error raise is that there is no proof that defendant in error has been damaged. The complaint alleges that for failure to deliver the bonds in accordance with the promise contained in the certificates, the plaintiffs were damaged in a sum equal to the face value of the bonds. Plaintiffs offered in evidence the certificates and it was admitted that the bonds had never been delivered. The damage for the breach to deliver the bonds is presumptively the amount expressed upon the face of the bonds.

> *Henry v. North American Railroad Construction Co.,* 158 Fed. 80.

In that case the description of the bonds which the defendant had agreed to deliver was almost identical with the description of the bonds here. The defendant had agreed to deliver "twenty of the first mortgage five per cent gold bonds of the Shawnee Traction Company, each for the principal sum of $1,000.00", and had failed to deliver part of them. The court said:

> "It being conceded that the plaintiff had fully performed its undertaking, but the de-

fendant had failed to keep and perform his contract by delivering to the plaintiff the $6,500.00, face value of bonds, in the action for breach of contract, the essential question is: What is the measure of damages? The answer the law makes is: The value of the bonds at the time they should have been delivered under the contract. Prima facie the amount expressed upon the face of the bonds is the value thereof (citing authorities).

When, therefore, the plaintiff had shown that the defendant had failed to deliver the bonds in question when they should have been delivered, it had made out a prima facie case entitling it to judgment for the face value of the bonds, with interest from date of default. The defendant then assumed the laboring oar to show, if he could, that the actual value was less."

The defendant made no showing that the amount of damage suffered by the plaintiffs is less than the face value of the bonds which they agreed to deliver. According to the foregoing authority and the authorities therein cited the plaintiffs have established that they have been damaged in the amount of the face value of the bonds which the company agreed to deliver.

DEFENDANT IN ERROR WAS NOT PROHIBITED FROM BRINGING THE PRESENT ACTION BY SECTION 726 CODE OF CIVIL PROCEDURE.

In the appendix of their brief, which plaintiffs in error have filed, a new point is raised which was not presented by them to the District Court and which has not been assigned as error. It would

seem, therefore, that this court is precluded by its rules from considering the point. "Appellate courts are not the proper forum to discuss new points" (*Walton v. Wild Goose Mining and Trading Co.,* 123 Fed. 209, and cases cited, decided by Circuit Court of Ninth Circuit). Plaintiffs in error might contend that they have the right to discuss the point under their assignment of error that the complaint does not state facts sufficient to constitute a cause of action. This they cannot do, however. Even if the certificate had been secured by a mortgage the complaint, as it is written, would not be demurrable for that reason. In *Hibernia Savings & Loan Society v. Thornton,* 117 Cal. 481, the action was on a promissory note to recover a personal judgment. The note, which was set out in the complaint, recited that it was secured by a mortgage. The court held that the complaint stated a cause of action, even though it asked for a personal judgment and not for the foreclosure of the mortgage, and that therefore a judgment on the pleadings was improperly granted. Plaintiffs in error state that the facts alleged in the complaint "raised grave doubt" whether the action was brought on an unsecured promise; but under the authority of the case just cited such grave doubt, if it did exist, would not render the complaint amenable to general demurrer, even though the cause of action stated therein was within the purview of Section 726, which it is not. The conclusion is that the point under discussion is a new point raised for the

first time in this court and not assigned as error. For these reasons we would be justified in refusing to consider it.

However, slight consideration of the point would show that it is not well taken. The new argument is that the certificate created an equitable lien upon property which is not identified by it, and that under Section 726 of the C. C. P. the only method of recovering under this certificate was by foreclosure of this lien.

The most obvious answer is that the action in this case is for damages for breach of the promise contained in the certificate to deliver bonds. The promise upon which suit is brought is unsecured. How Section 726 C. C. P., which applies to "actions for the recovery of any debt or the performance of any right secured by a mortgage" can possibly apply to an action of this character is inconceivable.

But even assuming that Section 726 would apply to an action of this character if the damages sought to be recovered were secured by an equitable lien, it is clear that the certificate upon which suit is brought could not in any event create an equitable lien. As plaintiffs in error admit, on pages ii and iii of their appendix, before an equitable lien can arise, the property to be subjected to the lien must be "so described that it can be identified"; and another essential to such a lien is "that an intention to create a charge on the property described

must be clear and apparent" (*19 Am. & Eng. Enc. of Law,* 14-15. See *Pomeroy,* Vol. 3, page 2471). No property is described in the certificate so that it can be identified, and as a matter of fact no property is referred to therein in any way; neither is there any intention manifested in the certificate to charge any property with a lien. The conclusion is that from whatever point of view the certificate is considered it could not create an equitable lien.

In support of their contention that an equitable lien was created by the certificate the plaintiff in error cite and quote from the case of *Beal v. United Properties Co.,* 189 Pac. 346; 31 C. A. D. 656. The agreement which was the basis of the action in the Beal case was not one of the certificates which is sued on here; but it was an oral agreement by which The United Properties Company agreed to deliver bonds secured by a deed of trust "covering all the real and personal property" of the company. The distinction between the contract forming the basis of the action in the Beal case and the certificate sued on here is manifest. An equitable lien might have been created in the former case, while it could not possibly exist in this.

Assuming that an equitable lien was created and that it would constitute a defense to this action, it was a new matter which should have been specially pleaded in the answer (Section 437 C. C. P.). As the plaintiffs in error did not plead it in their answer, they could not take advantage of it in the

trial court, and, of course, they cannot do so in this court.

Lastly, assuming that an equitable lien was created and that it had been pleaded as a defense, it could not constitute a defense to the action. A right to a personal action to recover a debt secured by a mortgage is prohibited by Section 726 C. C. P. But plaintiffs in error could not possibly claim that the relationship of mortgagor and mortgagee was raised by the certificate; they must then contend that the certificate created an equitable lien. In *Peoples' Home Savings Bank v. Sadler,* 1 Cal. App. 190, 192, it was held that the limitation upon the form of action which is declared in Section 726 C. C. P. extends only to "mortgages"; that the essential element of a mortgage is a transfer and conveyance of the mortgage property; and that, therefore, a corporation could collect an indebtedness due it by a stockholder without foreclosing the lien which the bylaws created upon his interest in the corporation as security for the indebtedness. It was held in *Samuel v. Allen,* 98 Cal. 406, that an independent action could be maintained on an indebtedness although the plaintiff had a vendor's lien as security. This case was followed in *Longmaid v. Coulter,* 123 Cal. 208.

In *11 Am. & Eng. Ency. of Law,* 129, the author on Equitable Mortgages says:

> "In agreements for the sale of land the relation between the vendor and the vendee is in equity analogous to that of an equitable mort-

> gagee and mortgagor, the vendee holding an equity which is liable to foreclosure at the suit of the vendor."

It thus appears that the cases just cited are directly in point and that the basis of the argument of plaintiffs in error is thus swept away. The conclusion is that in no aspect of this case can Section 726 C. C. P. apply; and therefore the final argument of plaintiffs in error must fail.

CONCLUSION.

In conclusion we wish to state merely that all the points raised by plaintiffs in error are extremely technical and hypercritical and that they are without any merit. The United Properties Company contracted to deliver to defendant in error thirteen bonds. It failed to do so, and for this breach of contract it must respond in damages. Nothing a resourceful counsel can say can alter this fact. We respectfully submit that the judgment of the District Court should be affirmed.

Dated, San Francisco,
May 7, 1921.

Respectfully submitted,

KEYES & ERSKINE,
Attorneys for Defendant in Error.